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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-

SAFEWAY STORES, INC., *et al.*,
Petitioners,

v.

MEAT PRICE INVESTIGATORS ASSOCIATION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals, which is reproduced in Appendix A, has been reported. *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979). The District Court for the Northern District of Texas entered judgment in the case without issuing an opinion.

JURISDICTION

The judgment of the court of appeals, which is reproduced in Appendix B, was entered on August 17, 1979. On August 31, 1979, the court of appeals extended the time for filing a petition for rehearing until September 14, 1979. A timely petition for rehearing was denied on April 24, 1980. The order denying rehearing is reproduced in Appendix C. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Illinois Brick Co. v. *Illinois*, 431 U.S. 720 (1977), prohibits antitrust actions by indirect purchasers or sellers. The question presented is whether that rule may be altered to permit indirect plaintiffs to sue on the claim that the use of pricing formulas and the condition of the market cause them rather than direct purchasers or sellers to suffer injury.

STATUTORY PROVISION INVOLVED

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained . . . ."

INTRODUCTION

This case presents an important issue of public policy involving this Court's decisions in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), and *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968). Under those decisions, only the purchaser or seller who deals directly with an antitrust violator may recover damages, and violators may not resist liability by claiming that the direct purchaser or seller passed on his loss

to someone else. Those decisions establish a definite and easily applied rule that has streamlined the administration of antitrust cases.

The decision below abandons this Court's bright-line rule. Certiorari should be granted for three reasons. First, the decision below contradicts prior decisions of this Court. Second, the decision below conflicts with decisions of other courts of appeals. Third, the ruling below will have far-reaching adverse effects on the administration of the federal antitrust laws. It will compel litigation of those issues that the *Illinois Brick* rule precludes and will prevent courts and parties from determining quickly and confidently who may bring suit.

STATEMENT OF THE CASE

In the mid-1970's several hundred cattlemen (the respondents herein) filed suits, including industry-wide class actions, against 25 food retailers, a food wholesaler, a retailers' trade association, and a beef industry publication (the petitioners herein). The cattlemen alleged that the retailers had conspired to pay meat packers artificially low prices for dressed beef and that the packers had passed on to the cattlemen the impact of the alleged violation by paying the cattlemen low prices for live cattle.[1] The cattlemen did not claim that they sold any of their cattle directly to the retailers.

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[1] In 1976, the Judicial Panel on Multidistrict Litigation assigned the cattlemen's cases to the District Court for the Northern District of Texas. *In re Beef Industry Antitrust Litigation*, 419 F. Supp. 720 (J.P.M.D.L. 1976). Certain of the same cattlemen plaintiffs shortly thereafter filed new suits, including an industry-wide class action, against a number of the largest meat packers, alleging that the cause of depressed cattle prices was a conspiracy among the middleman meat packers. These cases were also transferred to the Northern District of Texas. *See In re Beef Industry Antitrust Litigation*, 607 F.2d 167, 170 (5th Cir. 1979), *petition*

On June 9, 1977, this Court decided *Illinois Brick*, which holds that only those persons who deal directly with alleged antitrust violators may recover in private treble-damage actions under Section 4 of the Clayton Act.[2] The cattlemen then amended their complaints. They alleged that, although they did not deal directly with the retailers, they nonetheless absorbed the effect of any low wholesale beef prices because short-run cattle supply is highly inelastic and meat packers use formulas based on the wholesale price of beef to determine the prices they pay for cattle.[3]

Petitioners moved for judgment on the pleadings, and the district court dismissed the complaints on the authority of *Illinois Brick*. The court of appeals reversed, holding that the allegations of the amended complaints stated claims on which relief could be granted. It ruled that the cattlemen were entitled to attempt to show that the packers passed back to them the alleged reductions in beef prices without regard to market forces, and it proposed that there be pretrial proof about these circumstances to determine whether the *Illinois Brick* rule applies.

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for cert. filed sub nom. Iowa Beef Processors, Inc. v. *Meat Price Investigators Ass'n*, 48 U.S.L.W. 3538 (U.S. Feb. 6, 1980) (No. 79-1214).

[2] This Court's prior decision in *Hanover Shoe* held that an antitrust defendant may not assert as a defense that indirect purchasers, rather than the direct purchaser bringing the suit, were the parties in fact injured by illegal overcharges. 392 U.S. at 491-94.

[3] The allegations made in the amended complaints were proffered for the purpose of curing any defects in plaintiffs' pleadings in light of *Illinois Brick*. Motion for Leave to File Amended and Substituted Complaint, MPIA Record at 824-25, *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS IN *HANOVER SHOE* AND *ILLINOIS BRICK*

The rule of *Hanover Shoe* and *Illinois Brick* is simple: "pass-on" claims or defenses are not permitted. The explicit intent of that rule is to remove the necessity of tracing effects of price and output decisions throughout a distribution chain.

This Court allows virtually no departure from its rule, except for the situation where the middleman has a pre-existing, fixed quantity, cost-plus contract that fully insulates him from all fluctuations in price and in supply or demand.[4] The court below reasoned that if a pass-on claim is appropriate in the case of a cost-plus contract, it should also be appropriate in other circumstances where it is claimed that a combination of pricing formulas and inelasticity preempt ordinary market forces.[5] This raises three issues for litigation before a court may resolve the propriety of applying *Illinois Brick* or *Hanover Shoe*:

(1) How elastic is supply or demand,

(2) To what extent does the middleman determine price by the use of formulas, and

(3) How much of a "collusively fixed price" does the middleman absorb and how much is passed on to others.

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[4] This Court has also suggested that a pass-on defense might be permitted where the middleman is owned or controlled by its customer. *See Illinois Brick*, 431 U.S. at 736 n.16.

[5] *Beef Industry*, 600 F.2d at 1163-64, App. A at 30a-33a.

This Court has foreclosed precisely the inquiries that the court below authorized. For example, where the court below invited plaintiffs to attempt to prove that the market exhibited "structural inelasticity of short term supply,"[6] this Court has refused to permit inquiries about market elasticity, holding that pass-on claims or defenses cannot be based on such proof.[7] And where the court below invited plaintiffs to try to show that meat packers (the middlemen in these cases) used formulas to calculate the prices they would pay for live cattle,[8] this Court has refused to permit an inquiry into the use of pricing formulas such as a "fixed percentage markup" or "cost-based rules of thumb."[9] The court below, by requiring factual inquiry into the extent of a middleman's absorption of loss, mandates just the inquiry that this Court has prohibited.[10]

The gap between the views of the court below and the holdings of this Court is demonstrated in the words of *Illinois Brick* itself:

> "Respondents here argue, not without support from some lower courts, that pass-on theories should be

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[6] *Id.* at 1166, App. A at 36a.

[7] *Illinois Brick*, 431 U.S. at 744.

[8] *Beef Industry*, 600 F.2d at 1165, App. A. at 34a-35a.

[9] *Illinois Brick*, 431 U.S. at 743-45. There is no room for the view of the court below that in *Illinois Brick* this Court refused to create an exception for fixed markups because it was skeptical about whether the markups were strictly applied. *Beef Industry*, 600 F.2d at 1165, App. A at 35a. In *Illinois Brick* this Court expressly rejected an offer to prove the strict application of a fixed markup. *Illinois Brick*, 431 U.S. at 742-43 n.26.

[10] *Compare Beef Industry*, 600 F.2d at 1165, App. A at 35a-36a, *with Illinois Brick*, 431 U.S. at 737, 741.

permitted for middlemen that resell goods without altering them and for contractors that add a fixed percentage markup to the cost of their materials in submitting bids. . . . Exceptions . . . have also been urged for other situations in which most of the overcharge is purportedly passed on. . . .

"We reject these attempts to carve out exceptions . . . for particular types of markets. . . .

"More generally, the process of classifying various market situations according to the amount of pass-on likely to be involved and its susceptibility of proof in a judicial forum would entail the very problems that the . . . rule was meant to avoid." [11]

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE THIRD AND FOURTH CIRCUITS

Both the Third and Fourth Circuits have specifically addressed—and rejected—efforts to expand the cost-plus contract rationale to authorize other types of pass-through claims and defenses.

In *Mid-West Paper Products Co.* v. *Continental Group, Inc.*, 596 F.2d 573 (3d Cir. 1979), indirect purchasers of bags brought suit against bag manufacturers alleging violations of the antitrust laws. Defendants obtained summary judgment on the basis of *Illinois Brick*. On appeal, plaintiffs contended that "it is sufficient . . . to prove that there were pre-existing cost-plus arrangements, and that it is not necessary . . . to prove that any such arrangements were reduced to a formal contract or that they were for fixed quantities of goods." [12]

The Third Circuit rejected that contention as "manifestly not in accordance with the dictate of *Illinois*

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[11] *Illinois Brick*, 431 U.S. at 743-45 (footnotes omitted).

[12] 596 F.2d at 580.

Brick." [13] Noting that courts are not free to "extend the exception beyond the limited circumstances recognized by the Supreme Court," the court refused to stretch the exception "to include informal arrangements and patterns of cost-plus pricing." [14]

The decision below is also in conflict with the Fourth Circuit's decision in *Phillips* v. *Crown Central Petroleum Corp.*, 602 F.2d 616 (4th Cir. 1979), *cert. denied*, 100 S. Ct. 1021 (1980). In that case, gasoline retailers alleged a conspiracy to fix wholesale prices. Defendant, a wholesaler, attempted to assert a pass-on defense by arguing that wholesale and retail gasoline prices moved in fixed relation to each other, that the effect was the functional equivalent of a cost-plus contract between the plaintiffs and their customers, and that the plaintiffs had passed on any overcharge.[15] The Fourth Circuit held that an historical pattern or practice of cost-based pricing does not create an exception to *Illinois Brick*.[16]

III. THE DECISION BELOW RAISES AN ISSUE OF IMPORTANCE FOR THE ADMINISTRATION OF THE FEDERAL ANTITRUST LAWS

The rule in *Hanover Shoe* and *Illinois Brick* permits courts to determine quickly and confidently who may sue or assert a pass-on defense. The explicit purpose of the rule is to avoid

> "the uncertainties and difficulties in analyzing price and output decisions . . . [and] the costs to the judicial system and the efficient enforcement of the

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[13] *Id.*

[14] *Id.* at 577-78 n.9.

[15] 602 F.2d at 633.

[16] *Id.* at 633 & n.4.

antitrust laws of attempting to reconstruct those decisions in the courtroom." [17]

The only exceptions this Court recognizes are ones that can be established by simple, threshold evidence, without resort to analyses of price and output and the attendant uncertainty, difficulty, and cost.

The court below has created an amorphous new exception that requires proof of complex economic issues, including elasticity, formula pricing, and the impact of price changes. Measurement of elasticity of supply or demand is difficult or impossible even with the doubtful benefit of complex economic testimony.[18] And proof of adherence to formula pricing raises similarly difficult problems of theoretical analysis and factual proof.[19] To authorize the investigation of whether changes in price

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[17] *Illinois Brick*, 431 U.S. at 731-32 (footnote omitted).

[18] "[T]here remains a serious problem of measuring the relevant elasticities. . . . In view of the difficulties that have been encountered, even in informal adversary proceedings, with the statistical techniques used to estimate these concepts . . . it is unrealistic to think that elasticity studies introduced by expert witnesses will resolve the pass-on issue." *Illinois Brick*, 431 U.S. at 742.

The court below expressly noted this Court's conclusion in *Illinois Brick* that measuring "relevant elasticities" is a "near impossibility." *Beef Industry*, 600 F.2d at 1163 n.19, App. A at 31a n.19.

[19] "Firms in many sectors of the economy rely to an extent on cost-based rules of thumb in setting prices. . . . These rules are not adhered to rigidly, however; the extent of the markup (or the allocation of costs) is varied to reflect demand conditions. . . . The intricacies of tracing the effect of an overcharge on . . . prices, costs, sales, and profits thus are not spared the litigants." *Illinois Brick*, 431 U.S. at 744.

are passed through the distribution chain based on these, or similar factors, is to require precisely what *Illinois Brick* bars—"the process of classifying various market situations according to the amount of pass-on likely to be involved and its susceptibility of proof in a judicial forum . . . ." [20]

Moreover, the decision below ignores this Court's admonition that the application of its rule must not generate a series of complex factual contests to draw fine lines over economic issues.[21] The decision will require litigation whenever a party alleges formula pricing and high inelasticity. Formula pricing is commonplace, and inelasticity a matter of degree. Both involve matters of economic approximation and fine distinction, and both are easily alleged. The resulting litigation, ostensibly to determine application of the rule, will contest precisely those issues the rule proscribes.

This Court should reassert the rule of *Hanover Shoe* and *Illinois Brick* promptly and unequivocally. There are scores of antitrust cases that, like this matter, involve class actions with legions of named parties and potential claimants. Many, like the instant cases, are consolidated for pretrial purposes in circuits different from those in which they may ultimately be tried. The decision below opens a major conflict. If this Court allows the antitrust policy that was settled in *Hanover Shoe* and *Illinois Brick* to be reopened in pending and future antitrust cases, then new dimensions of complexity will be added to many of the almost 3,000 private antitrust cases now pending,

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[20] *Id.* at 744-45.

[21] "The litigation over where the line should be drawn in a particular class of cases would inject the same 'massive evidence and complicated theories' into treble-damages proceedings, albeit at a somewhat higher level of generality." *Id.* at 745.

and the accomplishments of *Hanover Shoe* and *Illinois Brick* will be undone.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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